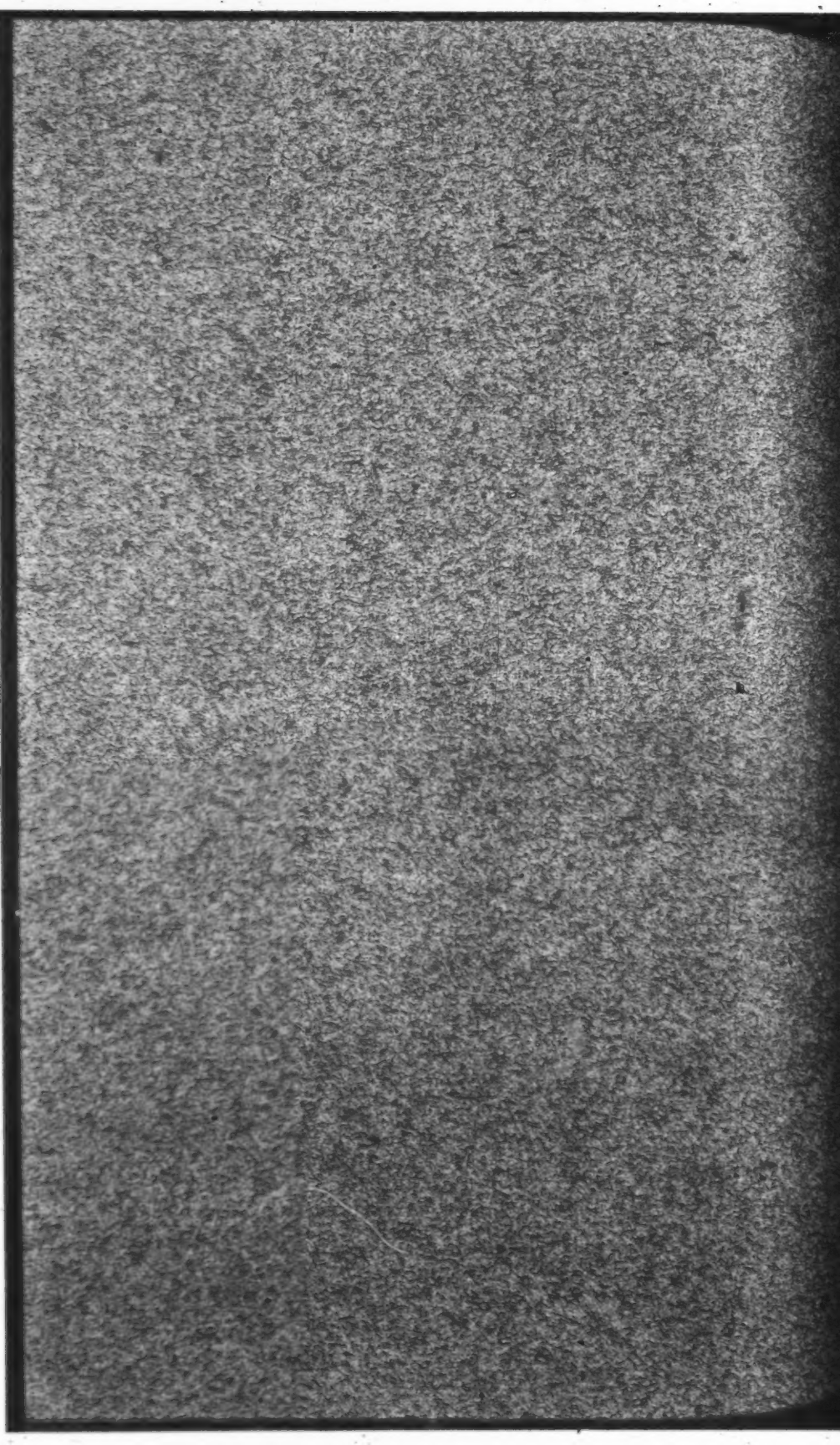

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No. 455

In the Supreme Court of the United States

OCTOBER TERM, 1930

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, AND ABRAHAM S. PHILLIPS, EXECUTORS OF THE ESTATE OF I. L. PHILLIPS, DECEASED, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 455

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. PHILLIPS, deceased, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 16–17) is reported in 15 B. T. A. 1218. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 23–29) is reported in 42 F. (2d) 177.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 16, 1930. (R. 28.) Petition for

certiorari was filed September 13, 1930. Certiorari was granted October 20, 1930. (R. 29.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 280 of the Revenue Act of 1926 is in conflict with the Constitution.

2. If Section 280 is valid, whether a stockholder receiving assets of a dissolved corporation in excess of the unpaid taxes of that corporation is liable for the payment of the total amount of such taxes.

STATUTES INVOLVED

The pertinent statutes involved will be found in the Appendices to this brief.

STATEMENT OF FACTS

The Coombe Garment Company, a Pennsylvania corporation, was dissolved during 1919, and its total assets in the sum of $68,558.35 were distributed to its stockholders in amounts proportionate to their stock ownership. (R. 14-15.)

The petitioners are the executors of the estate of I. L. Phillips, deceased, a resident of New York, who was a stockholder of the Coombe Garment Company at the time of its dissolution and received a distribution of $17,139.61. (R. 14-15.)

Subsequent to liquidation the respondent determined that additional income and profits taxes

were due from the corporation for the years 1918 and 1919, in the amounts of $277.75 and $9,124.68, respectively. The assessment of the 1918 tax was made in February, 1925, a waiver having been filed for that year, and the assessment of the 1919 tax in December, 1924. No payment has been made except a payment of $96.07 on the assessment for 1918. (R. 15, 16.)

On June 16, 1926, the respondent notified I. L. Phillips that in accordance with the provisions of Section 280 of the Revenue Act of 1926 he proposed to assess against him and collect from him the total amount of the deficiencies in the taxes of the corporation. In this communication the respondent advised Phillips that he was allowed a period of sixty days within which to file a petition with the Board of Tax Appeals for a redetermination of the deficiencies. (R. 8–9, 15–16.)

No corresponding notice of the deficiencies was sent to any of the other transferees of the corporate assets and no suit or proceeding for collection other than the present proceeding has been instituted. (R. 16.)

Petitioners, as executors of the estate of I. L. Phillips, deceased, filed a petition for redetermination within the sixty-day period. A hearing was had and thereafter the Board rendered an opinion, in which it declined to pass upon the constitutionality of Section 280 on the ground that the transferee having invoked its jurisdiction under that sec-

tion could not raise the question of its constitutionality, but held that the transferee was liable for the unpaid tax of the corporation to the extent of the amount received upon liquidation. (R. 1, 3-9, 16-17.)

Upon appeal to the Circuit Court of Appeals for the Second Circuit, that court affirmed the Board's decision in holding Phillips liable for the full amount of the tax, upheld the constitutionality of Section 280 and did not pass upon the respondent's contention that the petitioners were estopped to deny the constitutionality of that section. (R. 23-28.) The petitioners now seek a review by this Court.

SUMMARY OF ARGUMENT

It is well settled that the method regularly employed in collecting the Federal internal revenue by enforcing the collection of the tax first and permitting an appeal to the courts after payment constitutes due process. The use of summary process has not been restricted to the collection of taxes *qua* taxes but has also been applied to proceedings which are incidental or necessary to the taxing powers. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272.

Section 280 does not create a new liability but establishes a proceeding for enforcing the existing liability at law or in equity of the transferee, a liability which in the past has been enforced by suits

in equity. The procedure under Section 280 is identical in all material respects with that provided in the case of taxpayers including the right of an appeal to the Board of Tax Appeals and the alternative right of paying the tax first and later securing a judicial determination. Section 280 was enacted for the purpose of providing a more speedy and effective means of collecting the revenues of the Government. In *United States* v. *Updike*, 281 U. S. 489, it was recognized that a proceeding to enforce the liability of transferees is a proceeding to collect a tax. Hence the summary procedure provided under Section 280 does not constitute a violation of the due-process clause but is justified as a necessary adjunct to the taxing power.

The amount collected under Section 280 is an income tax and under the Sixteenth Amendment no consideration need be given to whether it meets the constitutional requirement that income taxes be apportioned according to population. No lack of uniformity in a constitutional sense will result from differences in State statutes which affect the liability of transferees.

Even if it should be held that Section 280 is not a revenue measure, the provision is nevertheless constitutional. It does not violate the due process clause, not only because the transferee has the alternative of paying the tax and suing to recover but also because the review of the Board's determi-

nation by the Circuit Court of Appeals gives him a judicial determination of his liability. It is immaterial that the determination of liability is in the first instance made by the Commissioner and the Board. This Court has in other instances sustained the power of Congress to place similar authority in administrative officers and boards. All that due process of law requires is that the individual shall have such notice and opportunity to defend as is commensurate with the character of the rights affected. *Hurwitz* v. *North*, 271 U. S. 40. The procedure under Section 280 complies with these requirements.

Nor is Section 280 unconstitutional on the ground that it improperly delegates judicial power to an administrative officer or body. The Commissioner's determination is in no sense judicial and that of the Board is only *quasi-judicial*. It is well settled that quasi-judicial powers may be vested in an executive body when this is necessary to the proper performance of the executive functions of the Government. For these reasons the power given to the Board to determine the liability of transferees does not violate the constitutional principle of separation of powers.

The liability of a transferee stockholder for the payment of the taxes of a dissolved corporation is not joint but is several to the extent of the assets received.

ARGUMENT

I

THE SUMMARY PROCEDURE PROVIDED BY SECTION 280 IS JUSTIFIED UNDER THE CONSTITUTION AS A NECESSARY ADJUNCT TO THE COLLECTION OF THE REVENUES OF THE GOVERNMENT AND AS A REVENUE MEASURE IT IS OTHERWISE UNOBJECTIONABLE

The right of the United States to collect its internal revenue by summary proceedings has been many times affirmed by this Court. *Cheatham* v. *United States*, 92 U. S. 85; *Nichols* v. *United States*, 7 Wall. 122; *Springer* v. *United States*, 102 U. S. 586; *Dodge* v. *Osborn*, 240 U. S. 118; *Graham* v. *du Pont*, 262 U. S. 234.

That the ordinary method employed in collecting internal revenue by enforcing the collection of the tax first and permitting an appeal to the courts after payment constitutes due process, is clearly stated in the case of *Springer* v. *United States*, *supra*, where the Court said (pp. 593–594):

> The proceedings of the collector were not in conflict with the amendment to the Constitution which declares that "no person shall be deprived of life, liberty, or property without due process of law." The power to distrain personal property for the payment of taxes is almost as old as the common law. Cooley, Taxation, 302. The Constitution gives to Congress the power "to lay and collect taxes, duties, imposts, and excises." Except as to exports, no limit to the exercise

of the power is prescribed. In *McCulloch* v. *Maryland* (4 Wheat. 316), Mr. Chief Justice Marshall said, "The power to tax involves the power to destroy." Why is it not competent for Congress to apply to realty as well as personalty the power to distrain and sell when necessary to enforce the payment of a tax? It is only the further legitimate exercise of the same power for the same purpose. In *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (18 How. 274), this court held that an act of Congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid; that the warrant was conclusive evidence of the facts recited in it, and that the proceeding was "due process of law" in that case. See also *De Treville* v. *Smalls*, 98 U. S. 517; *Sherry* v. *McKinley*, 99 id. 496; *Miller* v. *United States*, 11 Wall. 268; *Tyler* v. *Defrees*, id. 331.

The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government.

While in general the two principal requirements of due process, namely, notice and the right to de-

fend, are required in reference to taxation as in other matters, they are not so strictly applied. In *Hagar* v. *Reclamation District No. 108,* 111 U. S. 701, this Court said (pp. 708–709):

> Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson* v. *New Orleans:* "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

The petitioners do not deny that if in this case the Coombe Garment Company had continued in existence and the Government had employed precisely the same procedure to collect the tax from the corporation as it has followed in enforcing the liability of the transferee of the company for the tax (see *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716), such procedure would have constituted due process of law. There can be no possible doubt on that issue. Under the decisions just cited, prior to the creation of the Board of Tax Appeals the Government could, without violating the due process clause, have forced collection of the taxes by distraint and left the corporation to secure a judicial determination of its liability afterwards. Hence, the privilege of an additional administrative review by the Board before payment (see *Old Colony Trust Co.* v. *Commissioner, supra*) could not have been the subject of complaint.[1]

Nor, as the court below pointed out, has the use of summary procedure been restricted to the collection of taxes *qua* taxes. It has also been applied to proceedings which are incidental or necessary to the taxing powers. In *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, there was

[1] It is of interest that summary process in the collection of Government revenues has existed at least since the time of the Civil War. See Act of July 13, 1866, 14 Stat. 98, 107. Sections 3186 to 3205 of the Revised Statutes reenacting such legislation became effective in 1873 and as amended appear in all of the recent Federal revenue laws. See U. S. C., Title 26, Sections 115–134.

involved the validity of an Act which provided for distraint upon the property, the person, and the sureties of any revenue collector who failed to make a proper accounting to the Treasurer of the United States. The party distrained against was required to pay first and litigate later. In holding that said Act did not constitute a violation of the due process clause, this Court said (pp. 276, 281):

> The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government and can not be so construed as to leave congress free to make any process "due process of law" by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues.

* * * * *

Among the legislative powers of congress are the powers "to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and welfare of the United States, to raise and support armies; to provide and maintain a navy, and to make all laws which may be necessary and proper for carrying into execution those powers." * * *

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution.

If, therefore, Section 280 may be regarded as a necessary and proper means for effecting the collection of the revenue of the Government and the procedure which it provides is identical in all material respects with that provided in the case of the original taxpayer, it must be concluded that it affords due process of law.

That the purpose of Congress was to establish a more speedy and effective means of collecting its

revenues is beyond question. See Statement of House Conferees, H. R. 356, 69th Cong., 1st Sess., pp. 42–45. That such was the purpose of the provision and that it has proved to be highly effective in accomplishing this purpose were also pointed out by the House Ways and Means Committee in considering the retention of the provision in the Revenue Act of 1928, H. R. 2, 70th Cong., 1st Sess., pp. 31–32, as follows:

> Section 280 of the 1926 Act has proved a very effective and necessary method of stopping tax evasion through the various favorite methods recognized by everyone prior to the 1926 Act. The enforcement of the liability through court process had been ineffective, and the amount of revenue lost through mala fide transfers or through corporate distributions of assets was admittedly large. In fact, but slightly more than $120,000 was collected through court procedure during the entire period prior to the 1926 Act. Since the procedure under section 280 has been in effect more than $1,000,000 has been collected in uncontested cases, and many times this amount is involved in cases not yet disposed of. There is no doubt that to the effectiveness of section 280 can properly be attributed the increasing demands for prompt assessment received from corporations contemplating dissolution. And many other evidences of its effect are available.

Prior to the enactment of Section 280 the Government had the right to collect its taxes by proceeding against the transferees but the proceeding lacked the expedition which is necessary in the collection of revenue for the support of the government. The right of the Government to collect income and profits taxes due from a dissolved corporation by a suit in equity against the stockholders who have received its assets upon dissolution had been many times sustained by the Federal courts. *Updike* v. *United States* (C. C. A. 8th), 8 F. (2d) 913, certiorari denied, 271 U. S. 661; *United States* v. *Armstrong* (C. C. A. 8th), 26 F. (2d) 227; *United States* v. *Kemp* (C. C. A. 5th), 12 F. (2d) 7; *Capps Mfg. Co.* v. *United States* (C. C. A. 5th), 15 F. (2d) 528; *Pann* v. *United States* (C. C. A. 9th), 44 F. (2d) 321; *United States* v. *Garbutt* (C. C. A. 10th), 35 F. (2d) 924; *United States* v. *Fairall*, 16 F. (2d) 328; *United States* v. *McHatton*, 266 Fed. 602; *United States* v. *Klausner* (C. C. A. 2d), 25 F (2d) 608.

The existence of this right seems to have been assumed without discussion in *United States* v. *Updike*, 281 U. S. 489; *Russell* v. *United States*, 278 U. S. 181.

In addition to the remedies against transferees of corporate property afforded by the general equitable principles applied in the Federal courts, without restraint of State statutes or decisions, the United States could also have elected to pursue such other or additional remedies as were afforded

by State statutes, but it has been the general practice to proceed by suits in equity in the Federal courts.

Thus under the circumstances which exist in this case, the Government might have enforced its liability against the petitioners by a suit in equity[2] as it did in the *Updike case, supra.*[3]

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[2] Such equitable proceedings are founded on the principle that when the assets of a corporation are distributed to its stockholders without satisfying the claims of existing creditors, the stockholders become liable for the debts to the extent of the assets received. By many authorities this principle is treated as a limited application of the so-called "trust fund doctrine" and as such has received general support. *Graham* v. *Railroad Co.*, 102 U. S. 148; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371; *McDonald* v. *Williams*, 174 U. S. 397; *Pierce* v. *United States*, 255 U. S. 398; *Lawrence* v. *Greenup* (C. C. A. 6th), 97 Fed. 906. The cases cited have rejected the broader view that corporate assets at all times constitute a trust fund for its creditors. Cf. *Mumma* v. *Potomac Company*, 8 Pet. 281; *Curran* v. *State of Arkansas*, 15 How. 304; *Wood* v. *Dummer*, 3 Mason 308, but have recognized the stockholders' liability for corporate debts which arises in equity upon the insolvency or dissolution of the corporation. By other authorities this equitable liability has been linked with the doctrine of fraudulent conveyances. *McIver* v. *Hardware Co.*, 144 N. C. 478; *Luedecke* v. *Des Moines Cabinet Co.*, 140 Iowa 223; Pomeroy's Equity Jurisprudence, Secs. 907–908; 12 Yale Law Journal 63. By still others it has been identified with the law of implied contracts. *Owensboro Ditcher & Grader Co.* v. *Lucas* (W. D. Ky.), 18 F. (2d) 798, appeal dismissed on motion of appellant 22 F. (2d) 1015. Whatever the precise theory of such suit, the cases cited clearly disclose the existence of a right in equity to enforce collection of debts from transferee-stockholders.

[3] This might have been done either before or after the enactment of Section 280, for it does not provide an exclu-

Nor does Section 280 impose a new liability upon any other class of transferees. We believe it unnecessary to consider all of the classes of transferees which Section 280 was designed to reach. Some of the situations covered by Section 280 are suggested in the petitioners' brief, as, for example, fraudulent transfers of property between individuals, and transfers under contracts which imposed upon the transferee liability to pay the transferor's debts. See *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 F. (2d) 798, and H. R. 356, 69th Cong., 1st Sess., pp. 42–45. As to the liability of fiduciaries, Section 280 (a) (2) in specific terms enforces only those rights which the Government had under Section 3467 of the Revised Statutes (U. S. C., Title 31, Sec. 192.)

But we do not conceive that this Court in this case will find it necessary to define the limits of the applicability of Section 280. The significant fact about Section 280 is that it creates no new liability and that under this provision the Government will not be able to enforce any liability that it could not

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sive remedy. *United States* v. *Updike* (C. C. A. 8th), 32 F. (2d) 1, affirmed in 281 U. S. 489; *United States* v. *Greenfield Tap & Die Corp.* (D. Mass.), 27 F. (2d) 933. It should be noted, however, that in enacting the Revenue Act of 1928 a proposal was made to include an express provision to the effect that Section 280 was in addition to other proceedings and this was defeated, apparently in the belief that Section 280 was an effective and exclusive remedy. H. R. 2, 70th Cong., 1st Sess., p. 32; H. R. 1882, 70th Cong., 1st Sess., p. 22.

have enforced by other means before the statute was passed.

Section 280 (a) (1) provides in substance that the "liability, at law or in equity, of a transferee of property of a taxpayer" in respect of the tax imposed upon the taxpayer, with certain exceptions not here material, shall be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax." From this language it is clear that Section 280 is essentially a procedural provision to enforce existing liabilities. Obviously, loss of revenue and delay followed from the necessity of instituting a suit in equity or at law in every case where a transfer of assets rendered collection from the original taxpayer impossible. But until 1926 improvements gradually introduced in the method of assessment and collection as applied to the original taxpayers, including the creation of the Board of Tax Appeals by the Revenue Act of 1924, had left unchanged the procedure for the collection of taxes from transferees, notwithstanding the fact that the evasion or avoidance of taxes through the medium of a transfer of assets had increased owing to the high tax rates which followed the World War.

The procedure actually provided for in Section 280 is thus the same as that provided in the case of the original taxpayer and considered by this Court in the case of the *Old Colony Trust Co.* v.

Commissioner, supra. The transferee, like the taxpayer, has three alternatives: (1) He may, without paying the tax, file a petition with the Board of Tax Appeals for a redetermination of his liability, (2) he may voluntarily pay the amount of tax demanded, file a claim for refund, and upon its rejection sue for recovery, or (3) he may refuse payment and thus force collection by distraint or by suit.

If the transferee appeals to the Board as did the transferee in this case, under Sections 274 and 280 of the Revenue Act of 1926, *infra,* the subsequent procedure is identical with that considered by this Court in the *Old Colony Trust case, supra,* except that Section 912 of Title IX of the Revenue Act of 1924, added by Section 602 of the Revenue Act of 1928 (Appendix B, *infra,* p. 66), places the burden of proof upon the Commissioner to show that the petitioner is liable as a transferee of property of a taxpayer, though not to show that the taxpayer was liable for the tax, and Section 913, *infra,* gives the transferee the right to a preliminary examination of books, papers and other evidence of the taxpayer.

That Section 280 was enacted by Congress as an essential part of the tax-collecting system of the Government and that the procedure is the same as that employed in collecting amounts due from the original taxpayer has been demonstrated. We submit that the amount collected in this manner forms a part of the revenues of the Government,

and hence that the summary process against a transferee provided under Section 280 constitutes due process of law.

In the case of *United States* v. *Updike,* 281 U. S. 489, the transferee's liability was recognized as a liability for a tax. It was there urged by the Government that statutes of limitation relating to the collection of taxes from a corporation affected only the collection of taxes *qua* taxes and did not affect a suit in equity brought against the stockholders of a dissolved corporation under the trust fund theory. The Court rejected this contention, saying (p. 494):

> It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from § 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of § 278 (d) in relation to the period of limitation for the collection of a tax. Indeed, when used to connote payment of a tax, it puts no undue strain upon the word "taxpayer" to bring within its meaning that person whose prop-

> erty, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax.

Similarly, the Circuit Court of Appeals in the instant case and the Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Tyroler*, 36 F. (2d) 208, certiorari denied, 281 U. S. 734, pointed out that the term "taxpayer" is not seriously inaccurate when applied "to the involuntary payer of the tax debt."

In the case of *Felland* v. *Wilkinson* (W.D. Wis.), 33 F. (2d) 961, the court said (p. 963):

> It must be borne in mind that while the liability of a transferee may not be a tax liability in the ordinary sense, nevertheless it is a liability for a tax; in other words, the government is seeking to collect what is primarily a tax and continues to be a tax although, because of the inability to collect from the taxpayer proper, it seeks to require his transferee to pay. From the standpoint of the government the money sought in this case is as much an item of revenue as it would be were the proceedings to collect directed toward the Stoughton Lumber Association. Hence from its standpoint the same necessity exists for the collection of tax liabilities resting upon transferees as exists in the case of taxpayers. * * *

There is consequently as great a public necessity for the prompt enforcement of the liability of transferees for the payment of taxes as existed

for the collection of amounts due from the collector in the *Hoboken Land and Improvement Company case,* and if legislation to compel the payment of the latter amounts by summary process is justified as necessary and proper legislation under the constitutional power of Congress to impose taxes, clearly the enactment of the same procedural measures for enforcing the liability of transferees as are employed in collecting taxes from the original taxpayers are likewise justified.

There are decisions of this Court upholding other provisions of revenue laws which bear a certain analogy to the question here involved. In *Taft* v. *Bowers,* 278 U. S. 470, this Court considered whether Congress could require the donee of property to report as profit from its sale the excess of selling price over the investment by the donor, notwithstanding the fact that part of this increment in value had accrued while the property was in the hands of the donor. In that case the provision was upheld as appropriate for enforcing a general scheme of taxation. Similarly, in *United States* v. *Phellis,* 257 U. S. 156, it was held that a taxpayer who buys stock shortly before the payment of a dividend may be required to assume the place of his predecessor and pay the tax on the entire dividend. In *Tyler* v. *United States,* 281 U. S. 497, this Court upheld as an appropriate adjunct to the general scheme of taxation designed to prevent avoidance of estate taxes a provision for the inclusion in the gross estate of the value of property

held by the decedent and his wife as tenants by the entirety. See also *Milliken* v. *United States*, No. 87, October Term, 1930, decided March 2, 1931. The test is whether the legislation bears a reasonable relation to the enforcement of the tax. *Nigro* v. *United States*, 276 U. S. 332. In the language of *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

We submit that the enactment of Section 280 fell within the limitation of Article I, Section 8, of the Constitution as legislation which was "necessary and proper" in the exercise of the power of taxation. The procedure adopted being reasonably connected with and appropriate to the exercise of that power, it was for Congress and it is not for the Court to determine the degree of the necessity. *Everard's Breweries* v. *Day*, 265 U. S. 545, 559; *Legal Tender Case*, 110 U. S. 421, 440.

The view that the summary process provided in Section 280 is justified as a necessary adjunct to the taxing power constituted one of the grounds on which the court below sustained the constitutionality of this section. The decision of the District Court for the Western District of Kentucky in the *Owensboro Ditcher & Grader Co.* v. *Lucas case*,

supra, is contra, and the decision of that court has been followed in *Felland* v. *Wilkinson*, *supra*, and in *Mid-Continent Petroleum Corporation* v. *Alexander* (W. D. Okla.), 35 F. (2d) 43. The Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Tyroler*, *supra*, relied upon other grounds in upholding the constitutionality of the provision. The question involved in the *Owensboro Ditcher & Grader Company case*, the *Mid-Continent Petroleum Corporation case*, and the *Felland case*, was whether the transferee could secure an injunction to restrain the issuance and levy of a warrant of distraint to enforce the liability asserted against him under Section 280. The last two cases arose after the enactment of Section 604 of the Revenue Act of 1928, c. 852, 45 Stat. 791 (U. S. C. Sup. IV, Title 26, Section 2604), which specifically provides that no suit shall be maintained in any court for the purpose of restraining the assessment and collection of the transferee's liability. The Court in the *Mid-Continent Petroleum Corporation case* held Section 604 unconstitutional as a necessary result of the unconstitutionality of Section 280. In the *Felland case* the Court held that it was bound by Section 604 and accordingly its observations as to the constitutionality of Section 280 were not necessary to the decision.

Petitioners urge further that if the amount asserted against the transferee in this case is a tax it is beyond the power of Congress to impose a tax

of this character for the reasons (1) that it is not properly regarded as an income tax since it has no relation to the income of the transferee and is therefore either a direct tax not based on income and not apportioned among the States or an excise tax which lacks geographic uniformity, and (2) that, even if it may be regarded as an income tax because based upon the income of the corporation, the tax is not uniform throughout the United States, owing to differences in State statutes affecting the liability of transferees.

We submit that both contentions are without merit. The Government concedes that it is not seeking to collect a tax imposed upon the income of the transferee and that under Section 280 (a) (1) it seeks to enforce the liability of the transferee for income tax imposed upon the income of the corporation. But in *United States* v. *Updike, supra,* this Court not only held that a suit in equity to enforce the liability was in fact a proceeding to collect a tax but it also held that statutes of limitations relating to the collection of income taxes barred the proceeding.

In view of the decision in that case, we submit that Section 280 provides a procedure for collecting an *income tax,* notwithstanding the fact the tax is not imposed upon the income of the transferee. Hence under the Sixteenth Amendment, no consideration need be given to whether it meets the requirements of Article I, Section 2, Clause 3 of the Constitution that direct taxes be apportioned

among the several States according to their population.

The petitioners apparently make the same argument as to uniformity whether the tax be considered as an income tax or as neither an income tax nor a direct tax, but as some form of impost or excise (other than an income tax), namely, that the liability at law or in equity of a transferee differs materially in the various States and that the State may from time to time increase or decrease the transferee's liability and thus exercise powers confided by the Constitution exclusively to Congress.

The requirement of geographical uniformity is applied to income taxes as well as to other excise taxes. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1. But lack of geographical uniformity does not result from the fact that there may be differences in the State statutes which will affect the liability of the transferee or destroy it. So long as the Act uniformly applies to conditions which call its provisions into play wherever they may be found, the fact that due to local laws or conditions there may in some States be no subjects upon which to impose the tax is immaterial. *Head Money Cases*, 112 U. S. 580; *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311, 326. The situation is analogous to that presented in *Crooks* v. *Harrelson*, 282 U. S. 55, where this Court held that all real estate situated in Missouri belonging to a resident of that State at the time of his death was exempt from

Federal estate taxes under the Revenue Act of 1918, because of the fact that in that jurisdiction, unlike most others, real estate is not subject to the payment of administration expenses and hence does not come within the provisions of Section 402 (a) of that Act. Uniformity, in the sense contended for by petitioners here, was lacking in that case, but the Court upheld the tax.

The incidence of the Federal income tax and other excise taxes is in many instances indirectly affected by State laws. One example is the community property laws which materially reduce the amount of income taxes collected in States where that form of property exists. *Poe* v. *Seaborn*, 282 U. S. 101. Nor has it ever been held that a State may not alter its laws so that its citizens may be more advantageously situated with reference to Federal taxation. Cf. *United States* v. *Malcolm*, decided January 19, 1931, No. 512 on the docket of this Court for the present term.

II

EVEN IF SECTION 280 IS NOT TO BE REGARDED AS A REVENUE PROVISION, IT IS CONSTITUTIONAL

If it should be held that the enforcement of a transferee's liability for unpaid taxes of a dissolved corporation is not incidental to the taxing power, it is our position that Section 280 is nevertheless constitutional.

The essence of the petitioners' complaint is not that they, as executors of the estate of I. L. Phillips, have been deprived of property by an illegal assessment and collection, but that the liability of the transferee Phillips is being enforced by a "summary procedure" which does not provide for a judicial determination of liability at the outset.

They urge that the fact that the Commissioner and the Board have the right in the first instance to determine this liability violates the due process clause and the constitutional principle of the separation of powers. Petitioners assert that the legal or equitable liability of a transferee of property can only be initially determined in a court.

It should be noted that the petitioners came to the Board of Tax Appeals of their own volition and thus exercised an election to have their liability determined by the procedure provided in Section 280. There were other courses open to them. They might have paid the Collector under protest and sued at law for recovery, thus securing the advantage of a judicial determination of their liability in the first instance. It is conceded that this procedure would have been less desirable than an appeal to the Board in that it would have required the payment of the tax before securing a review of the Commissioner's determination, but it was at least an alternative remedy which would have given the petitioners a judicial review and a jury trial

such as they insist upon. They might also have refused payment and forced collection by distraint or by suit.

Owing to this opportunity for an election, the Board of Tax Appeals in this case, in *Henry Cappellini* v. *Commissioner*, 14 B. T. A. 1269, and in a number of other cases has refused to pass upon the constitutionality of Section 280, holding that a transferee who has exercised the option to appeal to the Board is estopped from questioning the validity of Section 280. In view of the fact that the Circuit Court of Appeals in the exercise of its right to review clearly had the power to pass upon the constitutionality of Section 280 and has held that it is constitutional without deciding whether the Board improperly refused to determine its validity, we do not believe that this Court will find it necessary to decide whether there was any estoppel.[4]

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[4] The Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Tyroler*, 36 F. (2d) 208, certiorari denied, 281 U. S. 734, stated that there was no estoppel, though that issue was not directly involved there and the statement may be regarded as *obiter*. The Board in the *Capellini case* relied upon the principle that one can not invoke the aid of a statute (as petitioners did by taking an appeal to the Board) and at the same time attack the validity of the statute so invoked. The authorities cited by the Board give support to this theory but to a certain extent are distinguishable on the facts. For example, *Great Falls Mfg. Co.* v. *Att'y General*, 124 U. S. 581, and *Merchants Heat & L. Co.* v. *Clow & Sons*, 204 U. S. 286, are cases where the party questioning the constitutionality of a statute has at the same time sought to recover a sum of money under it. *Daniels* v. *Tearney*, 102 U. S. 415, and *Wall* v. *Parrot Sil-*

In urging that the transferee has been deprived of a judicial determination of his liability the petitioners fail to give adequate consideration to the fact that a judicial determination is granted through the provision for review of the Board's decision by the Circuit Court of Appeals. We submit that the court below correctly held that the provision for review by the Circuit Court of Appeals affords due process without taking into consideration the alternative remedy of a suit to recover the tax after the payment. Sections 1001 to 1003 of the Revenue Act of 1926 (Appendix A, *infra*, pp. 55–57). See also *Routzahn* v. *Tyroler, supra*. The decision in the *Owensboro Ditcher & Grader Company case* is not *contra*, for that court in holding that Section 280 denied due process to the transferee did not give any consideration to his right to appeal from the Board of Tax Appeals to the Circuit Court of Appeals. The same thing may be said of the decisions in the *Mid-Continent Petroleum Corporation case, supra*, and the *Felland case, supra*.

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ver & Copper Co., 244 U. S. 407, are cases where in one action or transaction a party has claimed the benefit of a statute and in a subsequent action growing out of the same transaction seeks to prove it invalid. In *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208, the alternative remedy consisted in waiting to be sued instead of, as in this case, paying the amount and suing to recover. The position of a transferee is to some extent unique, for while he takes the appeal to the Board he is in the position of defending himself from the exaction of the Commissioner. For all of these reasons, we do not urge this point.

The conclusion of the court below that the review by the Circuit Court of Appeals suffices to afford the transferee due process is clearly correct. That the Circuit Courts of Appeals necessarily exercise judicial powers in reviewing decisions of the Board is settled by the *Old Colony Trust Company case, supra.* Section 1001 (b) of the Revenue Act of 1926 (Appendix A, *infra*, p. 55). The Circuit Courts of Appeals have power to affirm, or if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a hearing as justice may require. Section 1003 (b), *infra.*

The petitioners' position that a judicial determination is not secured appears to be based on the fact that the transferee's liability is not determined in the first instance by a court.

It is well settled that due process is not necessarily judicial process. *Murray's Lessee* v. *Hoboken Land & Improvement Co., supra; Reetz* v. *Michigan,* 188 U. S. 505. As pointed out in those cases, the essential requirements of due process of law are notice and an opportunity to be heard. Whether these requirements are met in a particular case depends largely upon the nature of the proceeding and the character of the rights which may be affected by it. *Hurwitz* v. *North,* 271 U. S. 40.

This Court has repeatedly sustained statutes relating to the enforcement of public rights where the determination of liability in the first instance

is made by administrative officers or boards, not only in revenue cases, but in other cases as well. The test is whether the statute gives an opportunity for a hearing commensurate with the necessities of the case and the character of the rights affected, and a judicial review is not always essential. *Hagar* v. *Reclamation District No. 108, supra; Hurwitz* v. *North, supra; United States* v. *Ju Toy,* 198 U. S. 253; *Int. Com. Comm.* v. *Louis. & Nash. R. R.,* 227 U. S. 88; *Lent* v. *Tillson,* 140 U. S. 316; Cooley's Constitutional Limitations, 8th Edition, Vol. II, Chap. XI, pp. 733–745. For example, the Secretary of Labor may exercise the power to exclude aliens and impose penalties upon steamship companies violating a statute which prohibits the bringing of diseased immigrants into the United States without the right of a complete judicial review. *The Japanese Immigrant case,* 189 U. S. 86; *United States* v. *Ju Toy, supra; Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320. The Post Office Department may deny the use of mails to those attempting to defraud the public. *Public Clearing House* v. *Coyne,* 194 U. S. 497. The Secretary of the Interior exercises broad powers with reference to the public lands. *Burfenning* v. *Chicago, St. Paul &c. Ry.,* 163 U. S. 321. Broad powers of a quasi-judicial nature, involving determination of facts and in some cases the application of rules of law thereto have been conferred on various other agencies of the Government. *Int. Com. Comm.* v. *Louis. & Nash. R. R., supra; United*

States v. *Los Angeles R. R. Co.*, 273 U. S. 299; *Silberschein* v. *United States*, 266 U. S. 221; *Federal Trade Comm.* v. *Pacific Paper Ass'n*, 273 U. S. 52. It is generally considered that due process is afforded the individual through the right of an appeal to an administrative body and through the right to a subsequent judicial review even where such review is limited to the question as to whether there has been an abuse of discretion or a violation of some constitutional principle. See *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, *supra*.[5]

Thus Congress may confer upon administrative officers and bodies even greater powers than have been conferred upon the Commissioner and the Board in determining the liability of a transferee under Section 280. It is pointed out that the Commissioner's determination is only *prima facie* correct (*Saxman Coal & Coke Co.* v. *Commissioner*

[5] The decisions in regard to violations of the due process clause of the 14th Amendment are in accord. In *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U. S. 440, the Court sustained a State statute requiring all claimants to the use of certain water to submit their claims to an administrative board and to make the preliminary order of the board effective pending review by a court unless a bond is filed to cover damages that may accrue. For other illustrations, see *Hawkins* v. *Bleakly*, 243 U. S. 210; *Hall* v. *Geiger-Jones*, 242 U. S. 539; *Title Guaranty Co.* v. *Allen*, 240 U. S. 136. Where the police powers of the States are involved the powers of executive officers and boards are even less subject to attack. *Hurwitz* v. *North*, *supra*; *North American Storage Co.* v. *Chicago*, 211 U. S. 306.

(C. C. A. 3rd), 43 F. (2d) 556; *Avery* v. *Commissioner* (C. C. A. 5th), 22 F. (2d) 6), and the Commissioner has the burden of proving the transferee's liability before the Board. There is nothing so unusual or obscure about a transferee's liability to the United States for taxes unpaid by his transferor as to require safeguards other than those assured by the statute in its determination. It is significant that under the English common law all debts due the Crown regardless of their source could be collected by summary process. *Murray's Lessee* v. *Hoboken Land & Improvement Co., supra.*

The procedure for the determination of this liability by the Board is not to be condemned because it is new. *Hurtado* v. *California,* 110 U. S. 516.

The due process clause has to do with matters of substance rather than matters of form. *Simon* v. *Craft,* 182 U. S. 427. In substance the procedure before the Board gives the transferee a fair hearing and enables the Circuit Court of Appeals to make an adequate review. The proceedings before the Board are substantially like proceedings in equity or in a civil case where a jury is waived. The rules of evidence applicable in the courts of equity in the District of Columbia control. Section 907 (a) of the Revenue Act of 1924, as amended (Appendix A, *infra,* pp. 50–51). The hearing is open to the public. Section 907 (a), *infra.* Witnesses may be subpœnaed and depositions taken. Section

908, *infra*. The rules of the Board require the filing of petition and answer and permit the filing of briefs and the presentation of oral arguments. The Board makes findings of facts, or renders an opinion, or both.

The fact that the transferee is compelled to assume the position of a plaintiff in a proceeding before the Board seems to be without significance. As a practical matter, the Commissioner by sending the notice of deficiency inaugurates the proceeding, and the petition filed with the Board more closely resembles an answer than a complaint. It should be noted that the burden of proving that the transferee is liable as such is upon the Commissioner and that only the burden of proving the taxpayer not liable for the tax is upon the transferee. Section 602 of the Revenue Act of 1928, adding Section 912 to the Revenue Act of 1926 (Appendix B, *infra*, p. 66). Consequently, the situation as to the proof of the transferee's liability is the same as it was before the enactment of Section 280, for before the adoption of the section a determination by the Commissioner of the amount due from a taxpayer would have been *prima facie* correct and the burden of proving the liability of the transferee would have been on the Government. It can not be presumed that the Board of Tax Appeals would apply these rules unfairly or that the transferee would not obtain as fair a hearing as he would get in a constitutional court.

The transferee is not deprived of the means of securing information necessary to his defense but on the contrary he is extended aid for that purpose. He is granted the right of a preliminary examination of the books and records of the taxpayer and if necessary the Board will issue a subpœna. Section 602 of the Revenue Act of 1928, adding Section 913 to the Revenue Act of 1924 (Appendix B, *infra*, p. 66).

While it is true, as suggested by the petitioners, that a transferee can not bring other transferees into the proceeding before the Board, that situation does not deprive him of any substantial right, for it does not affect his right to contribution. It is generally understood that the right to bring in other parties in an equitable action such as might have been instituted in this case independently of Section 280 does not exist for the benefit of the litigant but for the benefit of the court to prevent a multiplicity of suits. See *Hale* v. *Allison*, 188 U. S. 56. It has generally been held that nonjoinder is not a ground for dismissing a bill of this kind. *Pierce* v. *United States*, 255 U. S. 398. Cf. *United States* v. *Armstrong*, *supra*.

The contention that the statute is unconstitutional on the ground that it confers judicial powers upon the Commissioner or the Board may be readily disposed of, for it is obvious that neither exercises judicial powers within the meaning of the Constitution. In so far as the Commissioner is

concerned his preliminary determinations as to a transferee's liability are not different from what they were prior to the enactment of Section 280, when they formed the basis of a suit in equity to enforce a transferee's liability. The Board's determinations are quasi-judicial, rather than judicial. *Goldsmith* v. *Bd. of Tax Appeals*, 270 U. S. 117; *Blair* v. *Oesterlein Co.*, 275 U. S. 220.

In a broad sense all administrative duties, the performance of which involves an inquiry into the existence of facts and the application to them of rules of law, are duties of a judicial nature. *Murray's Lessee* v. *Hoboken Land & Improvement Co., supra.* But such duties are regularly performed by executive officers without recourse to preliminary judicial determinations and if they could not perform them the machinery of the Government would stop. *Weyerhaeuser* v. *Minnesota*, 176 U. S. 550. In the latter case there was involved a Minnesota statute providing that when it should appear to the Governor that there had been a gross undervaluation of taxable property in any county, he should appoint a board to revalue and reassess it. It was objected that the statute was unconstitutional in that it conferred judicial authority upon the Governor. In rejecting that contention the Court said (p. 556):

> If the basis of the complaint is that the Governor acts judicially and plaintiffs in error were entitled to have notice, and be

heard before he rendered judgment, it is also untenable. The Governor does not act judicially—he determines nothing but that a complaint has been made in writing and under oath, or that it has been found by a court, or the legislature or any committee thereof, that a considerable amount of property in a county of the State has been grossly undervalued. If the perception of the fact of a complaint or a finding of a court or legislature is a judgment in the sense urged, every act of government is a judgment, and all of its exercises could be stopped, upon the reasoning of plaintiffs in error, by perpetual hearings. But supposing the Governor's act is a judgment, it ends with the appointment of an examiner. What is substantial comes afterwards, and if against what may be detrimental in that the landowner can be heard, he is afforded due process within the rule announced by the authorities, *supra*.

See also *Reetz* v. *Michigan, supra; Shoemaker* v. *United States,* 147 U. S. 282; *Hoff* v. *Jasper County,* 110 U. S. 53.

It is recognized that there is a distinction between conferring duties of a judicial nature upon an official by giving him the right to exercise judgment and discretion and conferring upon him judicial power such as is referred to in the Constitution. *United States* v. *Ferreira,* 13 How. 39.

We submit that there is no constitutional prohibition against conferring quasi-judicial powers upon an executive board or officer, and it has gen-

erally been taken for granted that such powers may be conferred without violating the principle of separation of powers.* See for example, the decision of this Court in the *Old Colony Trust Company case, supra.*

The principle of the separation of powers is more relative than absolute. *Evans* v. *Gore,* 253 U. S. 245. Chief Justice Taft in the case of *Hampton & Co.* v. *United States,* 276 U. S. 394, 405–406, which involved the question of the exercise of legislative power by the President, said that constitutional boundary must be fixed "according to common sense and the inherent necessities of the governmental coordination." An illustration of this rule may be found in cases upholding the delegation to an administrative body of the power to make rules and regulations, which is in the nature of a legislative function. *United States* v. *Grimaud,* 220 U. S. 506.

It is, of course, a settled principle of law that every presumption is in favor of the constitutionality of an Act of Congress. *Nicol* v. *Ames,* 173 U. S. 509; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *United States* v. *Bennett,* 232 U. S. 299; *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 369.

* See article in 29 Columbia Law Review, 1052 (1929), by Harold C. Havighurst, "The Constitutionality of the Transferee Provisions of the Revenue Acts," in which the writer concludes that Section 280 is constitutional.

III

THE TRANSFEREES ARE JOINTLY AND SEVERALLY LIABLE FOR THE TAX TO THE EXTENT OF THE ASSETS RECEIVED BY THEM

In the event that the Court holds that Section 280 is constitutional, the petitioners urge further that their liability as executors of the estate of the transferee is limited to such portion of the corporate tax as is the ratio of the transferee's stock to the whole capital stock outstanding at the time of its dissolution.

The court below held that the transferee's liability is measured by the assets distributed to him, and that as the transferee in this case received assets in excess of the amount of the tax he was liable for the entire tax.

This view coincides with the decision of this Court in the case of *Hatch* v. *Dana*, 101 U. S. 205, where in answer to the contention that all the necessary parties had not been joined in a creditor's bill to obtain payment of a judgment against an insolvent corporation from unpaid stock subscriptions, the Court said (p. 210):

> The liability of a subscriber for the capital stock of a company is several, and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced

against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. * * *

To the same effect is *Ogilvie* v. *Knox Insurance Co.*, 22 How. 380.

It is true that those cases involved actions to enforce payment of a corporate debt from unpaid stock subscriptions, whereas in the instant case the Government is seeking to collect its tax debt from assets distributed to the stockholders. This distinction is immaterial, for there was no statute relied upon in either case and liability was enforced under the "trust fund" doctrine.

While the decisions of both Federal and State courts are not entirely harmonious, the view of this Court in *Hatch* v. *Dana*, *supra*, has been generally followed where the stockholder's liability which is being enforced is not a statutory liability.

In re Phoenix Hardware Co. (C. C. A. 9th), 249 Fed. 410; *Blood* v. *La Serena Land, etc., Co.*, 150 Cal. 764; *Singer* v. *Hutchinson*, 183 Ill. 606; *Adams* v. *Perryman & Co.*, 202 Ala. 469; *Kimbrough* v. *Davies*, 104 Miss. 722; *Cooper* v. *Security Co.*, 127 N. C. 219; *Bartlett* v. *Drew*, 57 N. Y. 587; Fletcher on Corporations, Vol. VI, Sec. 4127. Where the liability is dependent upon a statute no general rule can be stated, for it depends upon the phraseology of the statute. *Terry* v. *Little*, 101 U. S. 216. Even in such cases the weight of authority appears to favor the rule that unless the statute expressly provides for a joint liability, the liability is several rather than joint. *Terry* v. *Little, supra*; *Hodges & Wilson* v. *Silver Hill Mining Co.*, 9 Or. 200; *Hall & Co.* v. *Klinck*, 25 S. C. 348; Fletcher on Corporations, Vol. VI, Sec. 4127.

In the following cases the courts have held, as did the court below, that stockholders of a dissolved corporation are severally liable for the payment of corporate taxes to the extent of the assets received. *Pann* v. *United States, supra; Capps Mfg. Co.* v. *United States, supra; United States* v. *Boss & Peake Automobile Co.*, 285 Fed. 410, affirmed, *Boss* v. *United States* (C. C. A. 9th), 290 Fed. 167; *United States* v. *McHatton* (D. Mont.), 266 Fed. 602.

The petitioners rely upon *United States* v. *Armstrong, supra; United States* v. *Updike, supra; United States* v. *Snook*, 24 F. (2d) 844; and *Wood* v. *Dummer*, Fed. Cas. 17944 as authority for the

proportionate liability which they contend is the proper measure in this case if Section 280 is constitutional.

The *Snook case* is not opposed to our position. In that case there were only two stockholders. It was held that it was not misjoinder to sue both stockholders at once and that in a suit against both payment should be proportioned according to the assets received by each. The court indicated, that if one were insolvent, the entire amount could be recovered from the other and that the liability was several. Moreover, upon appeal the case was decided on other grounds by the Circuit Court of Appeals for the Fifth Circuit, *Austin* v. *United States*, 28 F. (2d) 677, and that court in the *Capps Manufacturing Company case, supra,* held the stockholder liable to the extent of the assets received.

The observation in the *Updike case* quoted by petitioners (Br. 43) was dictum, for all stockholders were parties to the suit. They were held liable in proportion to the amounts received in distribution. In the case of *United States* v. *Armstrong, supra,* however, the same Circuit Court of Appeals went further and held that all transferees within the jurisdiction should be made parties defendant or their absence explained, and that since all had not been made parties those before the court should be liable only for their pro rata shares of the transferee's liability. While this case does to some extent support the petitioners' position, it should be

noted that it is based upon equity rules regarding parties and is not in reality a decision regarding the extent of the transferee's liability "in law or in equity." The court, moreover, recognized that the failure to join all parties was open to explanation, and it held with respect to two stockholders who had not properly raised the question of nonjoinder that the right to complain had been waived.

The decision in *Wood* v. *Dummer, supra,* indicated that all stockholders are not necessary parties and the basis for holding the stockholders liable in proportion to their stock ownership appears to have been the peculiar circumstances of that case adverted to by Justice Story (30 Fed. Cas. 440).

It is significant that in enacting Section 280 Congress considered that the liability of each transferee is equal to the amount of assets received. In the House Conference Statement, H. R. 356, 69th Cong., 1st Sess., pp. 42–45, this statement was made (p. 43):

> By reason of the trust fund doctrine and various State statutory provisions the transferee of assets of an insolvent transferor is ordinarily liable for the accrued and unpaid taxes of the transferor. The amount of such liability is not in excess of the assets received and the transferee has a right of recoupment against other transferees of the assets of the same taxpayer, if the transferee is held liable in excess of his pro rata share of the tax liability of the transferor. * * *

It is submitted that the above is a correct statement of the law. It is not the duty of the Government to marshal the assets of a dissolved corporation and to adjust the rights of the various stockholders; it may follow the *res*, seize it wherever found, and leave the stockholders to make their own adjustments. Whether the transferees be regarded as tort-feasors in a constructive fraud, or merely as the receivers of trust funds which rightfully belong to others, their liability is both joint and several.

Petitioners contend that the assessment was barred by the Pennsylvania statute of limitations. The liability of the transferees was not based upon a statute of Pennsylvania but upon general equitable principles. Section 280 contains provisions for the limitation of assessments against transferees, and this is the sole limitation which bars the United States from assessing the liabilities provided by Section 280 upon transferees, for the United States is not bound by State statutes of limitations unless Congress has expressly provided that it shall be. *Ches. & Del. Canal Co.* v. *United States*, 250 U. S. 123; *United States* v. *Insley*, 130 U. S. 263; *United States* v. *Beebe*, 127 U. S. 338.

As the brief submitted by *amici curiæ* advances substantially the same arguments against the constitutionality of Section 280 as do the petitioners, we have deemed it unnecessary to deal with it separately.

CONCLUSION

Section 280 imposes no new liability but provides a practical and efficient process for the collection of Government revenue. It affords complete protection to the rights of transferees and is not in conflict with the Constitution. The court below has properly held that the petitioners are liable for the entire amount of unpaid taxes of the Coombe Garment Company inasmuch as the amount of those taxes is less than the sum which was distributed to the decedent without consideration.

Accordingly, the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APRIL, 1931.

APPENDIX A.

GENERAL PROVISIONS OF THE REVENUE ACTS RELATING TO THE BOARD OF TAX APPEALS

1. Sections 900 to 911 of Title IX of the Revenue Act of 1924, c. 234, 43 Stat. 253, 336–340 (U. S. C., Title 26, Secs. 1211–1222) as Amended by Title X, Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 105–113 (U. S. C. App., Title 26, Secs. 1211–1223), and Title IV, Section 601 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 871–873 (U. S. C. Sup. IV, Title 26, Secs. 1211–1223)

TITLE IX.—BOARD OF TAX APPEALS

MEMBERSHIP OF BOARD

SEC. 900. The Board of Tax Appeals (hereinafter referred to as the "Board") is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; except that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act.

SEC. 901. (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President,

after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each member shall receive salary at the rate of $10,000 per annum.

(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth year, four at the end of the tenth year, and four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

SEC. 902. A member of the Board removed from office in accordance with subdivision (a) of section 901 shall not be permitted at any time to practice before the Board.

ORGANIZATION AND PROCEDURE

SEC. 903. The Board shall at least biennially designate a member to act as chairman. The Board shall have a seal which shall be judicially noticed.

SEC. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be

fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment.

SEC. 905. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division, respectively.

SEC. 906. (a) The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto. A division shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

(b) The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period

the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board.

(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.

(d) A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as

its decision that there is no deficiency in respect of such tax.

(f) The findings of the Board made in connection with any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be *prima facie* evidence of the facts therein stated.

SEC. 907. (a) Notice and opportunity to be heard upon proceeding instituted before the Board shall be given to the taxpayer and the Commissioner, and a report upon the proceedings and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board. If an opportunity to be heard upon the proceeding is given before a division of the Board, neither the taxpayer nor the Commissioner shall be entitled to notice and opportunity to be heard before the Board upon review, except upon a specific order of the chairman. Hearings before the Board and its divisions shall be open to the public, and the testimony, and, if the Board so requires, the argument shall be stenographically reported. The Board is authorized to contract (by renewal of contract or otherwise) for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable

in courts of equity of the District of Columbia. In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner. The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, decision, order, notice, or process.

(b) It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions, and memorandum opinions.

(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted

for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents.

(e) The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States. The times and places of the meetings of the Board and of its divisions shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

(f) The Secretary of the Treasury shall provide the Board with suitable rooms in the courthouses or other buildings when necessary for hearings by the Board, or any division thereof, outside the District of Columbia.

WITNESSES

SEC. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence,

from any place in the United States at any designated place of hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent.

SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926.

EXPENDITURES AND PERSONNEL.

SEC. 910. The members of the Board shall receive necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as are now or may hereafter be applicable to the Board of Gen-

eral Appraisers. The employees of the Board shall receive their necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, in an amount not to exceed $5 per day. The Board is authorized in accordance with the Classification Act of 1923 to fix the compensation of, such employees, and to make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodicals), as may be necessary efficiently to execute the functions vested in the Board. All expenditures of the Board shall be allowed and paid, out of any moneys appropriated for the purposes of the Board, upon presentation of itemized vouchers therefor signed by the chairman. All fees received by the Board shall be covered into the Treasury as miscellaneous receipts. Section 3709 of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the Board when the aggregate amount involved does not exceed the sum of $25.

FRIVOLOUS APPEALS TO THE BOARD

SEC. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax.

2. Section 1001 of the Revenue Act of 1926, as Amended by Section 603 of the Revenue Act of 1928

COURT REVIEW OF BOARD'S DECISION

SEC. 1001. (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, condi-

tioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax law. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Board is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated.

3. Section 1002 of the Revenue Act of 1926.

VENUE

SEC. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

4. Section 1003 of the Revenue Act of 1926.

JURISDICTION

SEC. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

5. Section 1004 of the Revenue Act of 1926.

FILING FEE

SEC. 1004. (a) The Circuit Courts of Appeals, the Court of Appeals of the District of Columbia, and the Supreme Court shall have power to impose

damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay.

(b) The Board is authorized to fix a fee, not in excess of the fee fixed by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing, a transcript of the record.

6. Section 1122 (a) of the Revenue Act of 1926.

JURISDICTION OF COURTS

SEC. 1122. (a) If any person is summoned under this Act to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

APPENDIX B

PROVISIONS OF REVENUE ACTS RELATING TO THE ENFORCEMENT OF THE LIABILITY OF TRANSFEREES

1. Section 280 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 61 (U. S. C. App., Title 26, Sec. 1069) as Amended by Section 505 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 870 (U. S. C. Sup. IV, Title 26, Sec. 1069)

CLAIMS AGAINST TRANSFERRED ASSETS

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the

same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect to the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period, then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within

either of the above periods, then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

2. Sections 273 and 274 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 55–57 (U. S. C. App., Title 26, Secs. 1047–1049, 1054). Section 280 incorporated by reference.)

DEFICIENCY IN TAX

SEC. 273. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day

period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

(d) The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivison (a) of this section on the assessment and collection of the whole or any part of the deficiency.

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the

amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered, for the purposes of this subdivision or of subdivision (a) of this section, or of subdivision (d) of section 284, as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subdivision (a) of this section.

(g) The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years

as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

(h) For the purposes of this title the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1005.

(i) If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in section 279, that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(j) Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under subdivision (d) of this section, to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

(k) Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of eighteen months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficiency in accordance with the terms of the extension. In such case there shall be collected, as a part of the tax, interest on the part of the deficiency the time for payment of which is so extended, at the rate of 6 per centum per annum for the period of the extension, and no other interest shall be collected on such part of the deficiency for such period. If the part of the deficiency the time for payment of which is so extended is not paid in accordance with the terms of the extension, there shall be collected, as a part of the tax, interest on such unpaid amount at the rate of 1 per centum a month for the period from the time fixed by the terms of the extension for its payment until it is paid, and no other interest shall be collected on such unpaid amount for such period.

3. Sections 912 and 913 of Title IX of the Revenue Act of 1924 (U. S. C. Sup. IV, Title 26, Secs. 1229, 1230) Added by Section 602 of the Revenue Act of 1928

TRANSFEREE PROCEEDINGS

SEC. 912. In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax.

SEC. 913. Upon application to the Board, a transferee of property of a taxpayer shall be entitled, under rules prescribed by the Board, to a preliminary examination of books, papers, documents, correspondence, and other evidence of the taxpayer or a preceding transferee of the taxpayer's property, if the transferee making the application is a petitioner before the Board for the redetermination of his liability in respect of the tax (including interest, penalties, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer. Upon such application the Board may require by subpœna, ordered by the Board or any division thereof and signed by a member, the production of all such books, papers, documents, correspondence, and other evidence within the United States the production of which, in the opinion of the Board or division thereof, is necessary to enable the transferee to ascertain the liability of the taxpayer or preceding transferee and will not result in undue hardship to the taxpayer or preceding transferee. Such examination shall be had at such time and place as may be designated in the subpœna.

4. Section 604 of the Revenue Act of 1928 (U. S. C. Sup. IV, Title 26, Sec. 3604)

SUITS TO RESTRAIN ENFORCEMENT OF LIABILITY OF TRANSFEREE OR FIDUCIARY

SEC. 604. No suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any income, war-profits, excess-profits, or estate tax, or (2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes in respect of any such tax.

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